

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

5:12 **FILED** O'Clock **M**
APR 13 2011
JEANNE HICKS, Clerk
by *[Signature]* Deputy

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: April 13, 2011

TITLE:

COUNSEL:

STATE OF ARIZONA

Sheila Sullivan Polk
Yavapai County Attorney
Bill Hughes, Esq.
Deputy Yavapai County Attorneys

(Plaintiff)

(For Plaintiff)

vs.

JAMES ARTHUR RAY

Thomas K. Kelly, Esq.
425 E. Gurley
Prescott, AZ 86301

Luis Li, Esq.
Brad Brian, Esq.
Truc Do, Attorney at Law
Miriam Seifter, Attorney at Law
MUNGER TOLLES & OLSON LLP
355 S. Grand Avenue, 35th Fl.
Los Angeles, CA 90071

(Defendant)

(For Defendant)

**UNDER ADVISEMENT RULING ON
DEFENDANT'S MOTION FOR MISTRIAL FILED APRIL 11, 2011**

The Court has considered the motion and addendum, the response and supplement, and the arguments of counsel.

As announced at the close of oral argument, the Court finds that the State has violated the affirmative duty under *Brady v. Maryland* and its progeny to "disclose evidence that is both favorable to the defense and material to either guilt or punishment." *United States v. Boss*, 263 F.3d 734, 739-40 (7th Cir.2001) (citations omitted). All three requirements for a *Brady* violation have been met: "(1) the prosecution suppressed evidence (2) the evidence was favorable to the defense, and (3) the evidence was material to an issue at trial." *Id.*, 263 F.3d at 740.

(1) Suppression of the Evidence.

Despite the Defendant's repeated, specific requests for disclosure relating to an expert witness with whom the State had consulted about this case, the State did not provide until last week information in its possession which, in addition to the *Brady* obligation arising from a person's constitutional right to due process, was subject to the provisions of Rules 15.1(b)(1), 15.1(b)(4), 15.1(b)(8), and 15.1(e)(3) of the Arizona Rules of Criminal Procedure. As noted by the Defendant, the State not only failed to disclose the information, it misrepresented (whether inadvertently or not) that no such information existed.

(2) The Evidence is Favorable.

The emailed report from Rick Haddow to Detective Diskin on April 29, 2010, contained information that, for purposes of *Brady* and Rule 15 analysis, was clearly exculpatory. As noted by the Defendant, the information was arguably favorable to him in all aspects of his defense as presented at trial.

(3) The Evidence is Material.

The United States Supreme Court has set forth the following test for materiality in determining whether a *Brady* violation has occurred:

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 473 U.S. 667, 681 (1985).¹ As noted by the language of the test, its application generally occurs after trial when an appellate court attempts to assess the effect the suppressed evidence, if disclosed, would have had on the result of that trial. The State argues that since the information has now been disclosed, the Defendant cannot establish materiality. "When previously undisclosed exculpatory information is revealed at the trial and presented to the jury, there is no *Brady* violation." *State v. Bracy*, 145 Ariz. 520, 528, 703 P.2d 464, 472. "This is true even though the pretrial nondisclosure may have affected the appellant's trial preparation and strategy." *State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 413 (1981) (citation omitted). As the Defendant contends, however, there are certainly situations where disclosure during trial will not prevent prejudice to a defendant. See *Leka v. Portundo*, 257 F.3d 89, 100-102 (2nd Cir.2001).

In concluding that the late-disclosed information is material, the Court notes that the expert's preliminary report is not cumulative. Furthermore, the late disclosure could prejudice the Defendant's ability fully to present a defense. Under these circumstances, the evidence in question must be deemed material for purposes of *Brady* analysis.

¹ Arizona courts may apply a standard that is more favorable to defendants. *State v. Bracy*, 145 Ariz. 520, 528, 703 P.2d 464, 472 ("[W]here a pretrial request has been made for specific evidence, the judgment must be vacated if the suppressed evidence might have affected the outcome of the trial.") (citing *United States v. Augurs*, 427 U.S. at 112.)


CONCLUSION

Although the previously undisclosed evidence is material, the Court notes that the Defendant still has an opportunity to present to the jury the favorable information contained in the Haddow report. That information appears to be consistent with the defense being presented at trial, as was articulated by counsel at oral argument on the motion for mistrial. Furthermore, circumstances regarding the late disclosure can be the subject of cross-examination of both future witnesses and witnesses who are recalled to testify.

At the present time, the Court concludes that mistrial is not warranted under *Brady* or Rule 15.7 of the Arizona Rules of Criminal Procedure. Therefore,

IT IS ORDERED ***denying*** the motion for mistrial.

DATED this 13th day of April, 2011.


Warren R. Darrow
Superior Court Judge

cc: Victim Services Division